



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 11 April 2019¹

Case C-619/18

European Commission
v

Republic of Poland

(Failure of a Member State to fulfil obligations — Article 258 TFEU — Article 7 TEU — Rule of law — Article 19(1) TEU — Principle of effective judicial protection — Principles of independence and irremovability of judges — Charter of Fundamental Rights of the European Union — Articles 47 and 51 — National measures lowering the retirement age of Supreme Court judges in office — Absence of a transitional period — National measures granting the President of the Republic discretion to extend the active mandate of Supreme Court judges)

I. Introduction

1. In the present case, the Commission has brought infringement proceedings against the Republic of Poland under Article 258 TFEU for failing to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), on the grounds that, first, national measures lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) appointed to that court before 3 April 2018 infringe the principle of irremovability of judges, and second, national measures granting the President of the Republic discretion to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age infringe the principle of judicial independence.

2. Fundamentally, this case presents the Court with the opportunity to rule, for the first time within the context of a direct action for infringement under Article 258 TFEU, on the compatibility of certain measures taken by a Member State concerning the organisation of its judicial system with the standards set down in the second subparagraph of Article 19(1) TEU, combined with Article 47 of the Charter, for ensuring respect for the rule of law in the Union legal order.² It also raises some important questions concerning the material scope of the second subparagraph of Article 19(1) TEU in relation to that of Article 47 of the Charter and the relationship between the procedures of Article 258 TFEU and Article 7 TEU.

¹ Original language: English.

² In addition to the present case, there are several other cases pending before the Court relating to the reform of the Polish judiciary, including an infringement action (C-192/18) and requests for preliminary rulings submitted by the Polish Supreme Court (C-522/18, C-537/18, C-585/18, C-624/18, C-625/18 and C-668/18), the Polish Supreme Administrative Court (C-824/18) and Polish lower courts (C-558/18, C-563/18 and C-623/18). It should be noted that, if, in its judgment of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687, the Court ruled on the compatibility with EU law of measures lowering the retirement age of judges, prosecutors and notaries, it did so on the basis of a breach of the prohibition on age discrimination in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). See point 80 of this Opinion.

II. Legal framework

A. EU law

3. The second subparagraph of Article 19(1) TEU states:

‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’

B. Polish law

4. Article 30(1) of the Ustawa z dnia 23 listopada 2002 r. o Sądzie Najwyższym (Law of 23 November 2002 on the Supreme Court, Dz. U. No 240 of 2002, heading 2052, as amended) (‘2002 Law on the Supreme Court’) set the retirement age for Supreme Court judges at 70, unless, no later than 6 months before reaching 70, a judge submitted a declaration to the First President of the Supreme Court indicating his wish to continue to perform his duties and presented a certificate attesting to the state of his health. In that case, under Article 30(5) of that law, that judge could automatically perform his duties until the age of 72.

5. On 20 December 2017, the President of the Republic signed Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Supreme Court, Dz. U. of 2018, heading 5, as amended) (‘Law on the Supreme Court’) which entered into force on 3 April 2018.

6. Article 37(1) to (4) of the Law on the Supreme Court states:

‘1. A judge of the Supreme Court shall retire on the day of his 65th birthday, unless, not later than 6 months before that day and not earlier than 12 months before that day, he submits a declaration that he is willing to continue serving in the office of judge and presents a certificate confirming that his health is no impediment to performing the duties of a judge, issued in accordance with the rules specified for candidates applying for the office of judge, and the President of the Republic of Poland consents to his continuing to serve as a Supreme Court judge.

1a. Prior to granting consent for a judge to continue to serve as a judge of the Supreme Court, the President of the Republic of Poland shall consult the National Council of the Judiciary. The National Council of the Judiciary shall provide the President of the Republic of Poland with an opinion within 30 days of the date on which the President of the Republic of Poland requests submission of such an opinion. If the opinion is not submitted within the period referred to in the second sentence, the National Council of the Judiciary shall be deemed to have submitted a positive opinion.

1b. When drafting the opinion referred to in paragraph 1a, the National Council of the Judiciary shall take into account the interest of the system of justice or an important social interest, in particular the rational use of the Supreme Court’s staff or the needs arising from the workload of individual chambers of the Supreme Court.

2. The declaration and certificate referred to in paragraph 1 shall be submitted to the First President of the Supreme Court, who shall promptly submit it, together with his opinion, to the President of the Republic of Poland. The First President of the Supreme Court shall submit his declaration and certificate together with the opinion of the College of the Supreme Court to the President of the Republic of Poland.

3. The President of the Republic of Poland may grant consent for a judge of the Supreme Court to continue in his post within 3 months of the date of receipt of the opinion of the National Council of the Judiciary referred to in paragraph 1a, or within 3 months of the expiry of the period for the submission of that opinion. Failure to grant consent within the period referred to in the first sentence shall be tantamount to the judge retiring on the day of his 65th birthday. If the proceedings related to a judge of the Supreme Court continuing in his post are not completed after the age referred to in paragraph 1 has been reached, the judge shall remain in his post until the proceedings are completed.

4. The authorisation referred to in paragraph 1 shall be granted for a period of 3 years, no more than twice. The provisions of paragraph 3 shall apply *mutatis mutandis*. Any judge authorised to extend his duties at the Supreme Court may retire at any time after his 65th birthday by sending a declaration to the First President of the Supreme Court, who immediately transmits it to the President of the Republic of Poland. The First President of the Supreme Court sends his declaration directly to the President of the Republic of Poland.’

7. Article 111(1) and (1a) of the Law on the Supreme Court states:

‘1. Judges of the Supreme Court who by the date of entry into force of this Law have reached the age of 65 or who will have reached the age of 65 within 3 months of the date of entry into force of this Law shall retire on the day following the expiry of 3 months from the date of entry into force of this Law, unless they submit the declaration and certificate referred to in Article 37(1) within 1 month of the date of entry into force of this Law and the President of the Republic of Poland consents to the judge of the Supreme Court continuing in his post. The provisions of Article 37(2) to (4) shall apply *mutatis mutandis*.

1a. Judges of the Supreme Court who reach the age of 65 between 3 and 12 months after the date of entry into force of this Law shall retire 12 months from the date of entry into force of this Law, unless they submit the declaration and certificate referred to in Article 37(1) within that period and the President of the Republic of Poland consents to the judge of the Supreme Court continuing in his post. The provisions of Article 37(1a) to (4) shall apply *mutatis mutandis*.’

8. Ustawa z dnia 10 maja 2018 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law of 10 May 2018 amending the Law on the organisation of the common law courts, the Law on the Supreme Court and certain other laws, Dz. U. of 2018, heading 1045) (‘Amending Law of 10 May 2018’) contains, in addition to provisions amending the Law on the Supreme Court, certain autonomous provisions governing the procedure for the extension of the active mandate of Supreme Court judges who have reached the retirement age of 65 no later than 3 July 2018. Article 5 of that law states:

‘The President of the Republic of Poland shall transmit immediately to the National Council of the Judiciary the declarations referred to in Article 37(1) and Article 111(1) of the Law [on the Supreme Court] which he has not examined by the date of entry into force of this Law. The National Council of the Judiciary shall deliver its opinion within 30 days from the day when the President of the Republic of Poland invited it to present its opinion. The President of the Republic of Poland may authorise a judge of Supreme Court to continue to exercise his functions within 60 days from the date of receipt of the opinion of the National Council of the Judiciary or the expiration of the deadline for the submission of this opinion. The provisions of Article 37(2) to (4) of the Law [on the Supreme Court], as amended by this Law, shall apply *mutatis mutandis*.’

9. On 17 December 2018, the President of the Republic signed Ustawa z dnia 21 listopada 2018 r. o zmianie ustawy o Sądzie Najwyższym (Law of 21 November 2018 amending the Law on the Supreme Court, Dz. U. of 2018, heading 2507) (‘Law of 21 November 2018’) which entered into force on 1 January 2019. Under Article 1 of that law, Articles 37(1a) to (4) and Articles 111(1) and (1a) of the

Law on the Supreme Court are repealed, and under Article 2 of that law, judges of the Supreme Court, including those appointed as the First President of the Supreme Court, who were retired pursuant to those provisions of the Law on the Supreme Court are reinstated as judges and the performance of their duties is deemed to have continued without interruption.

III. Pre-litigation procedure

10. Even though the Article 7(1) TEU mechanism was triggered by the Commission on 20 December 2017,³ on 2 July 2018, it sent Poland a letter of formal notice, in accordance with Article 258 TFEU, regarding the conformity of the Law on the Supreme Court and the Amending Law of 10 May 2018 (together ‘the contested measures’) with the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter, and invited it to submit its observations within 1 month.

11. By letter of 2 August 2018, Poland responded to the letter of formal notice. It contested the Commission’s arguments and asked that the procedure be closed.

12. On 14 August 2018, the Commission addressed a reasoned opinion to Poland, alleging that it had failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter. It invited Poland to comply with that reasoned opinion within 1 month of receiving it.

13. On 14 September 2018, Poland responded to the reasoned opinion, reiterating its position that the alleged failure to fulfil obligations was unfounded and requesting closure of the procedure.

IV. Procedure before the Court

14. By its application lodged on 2 October 2018, the Commission brought the present action before the Court under Article 258 TFEU. It claims that the Court should:

- declare that by lowering the retirement age of the judges of the Supreme Court and applying it to judges appointed to that court before 3 April 2018, and by granting the President of the Republic the discretion to extend the period of judicial activity of Supreme Court judges, the Republic of Poland failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter;
- order the Republic of Poland to pay the costs of the proceedings.

15. In its defence lodged on 17 December 2018, the Republic of Poland contends that the Court should:

- dismiss the present action in its entirety as unfounded;
- order the Commission to pay the costs of the proceedings.

16. By separate document lodged on 2 October 2018, the Commission brought an application for interim measures under Article 279 TFEU and Article 160(2) and (7) of the Rules of Procedure, asking the Court to order Poland: first, to suspend application of Article 37(1) to (4) and of Article 111(1) and (1a) of the Law on the Supreme Court, Article 5 of the Amending Law of 10 May 2018 and all other measures adopted in application of those provisions; second, to adopt all necessary

³ Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017.

measures to ensure that the Supreme Court judges affected by those provisions carry out their duties in the same posts while benefiting from the same rights and conditions as those applicable before 3 April 2018; third, to refrain from taking any measure appointing judges to the Supreme Court or a new First President of that court in the place of those affected by those provisions; and fourth, to communicate monthly to the Commission the measures adopted to comply fully with that order.

17. The Commission also requested, pursuant to Article 160(7) of the Rules of Procedure, that the foregoing interim measures be granted before Poland had submitted its observations, in view of the immediate risk of serious and irreparable damage for the principle of effective judicial protection in the context of the application of EU law.

18. By order of 19 October 2018, the Vice-President of the Court provisionally granted that latter request pending the adoption of the order terminating the proceedings for interim measures.⁴

19. By its application lodged on 22 October 2018, Hungary applied for leave to intervene in the proceedings for interim measures in support of Poland. Leave for intervene was granted by decision of 30 October 2018 for the purposes of the oral phase of the procedure.

20. On 23 October 2018, the Vice-President of the Court, in accordance with Article 161(1) of the Rules of Procedure, referred the application for interim measures to the Court which, having regard to its importance, attributed it to the Grand Chamber in accordance with Article 60(1) of the Rules of Procedure.

21. By order of 17 December 2018, the Court granted in full the Commission's application for interim measures until delivery of final judgment in the present case.⁵

22. Moreover, on 2 October 2018, the Commission requested the Court to decide the present case under an expedited procedure as referred to in Article 23a of the Statute and Article 133 of the Rules of Procedure. By order of 15 November 2018, the President of the Court granted that request.⁶

23. By its application lodged on 24 October 2018, Hungary applied for leave to intervene in support of Poland. On 19 December 2018, the President of the Court decided, under Article 134 of the Rules of Procedure, not to authorise the lodging of a reply, rejoinder or statement in intervention. Leave to intervene was granted by decision of 9 January 2019 for the purposes of the oral phase of the procedure.

24. A hearing was held on 12 February 2019 at which the Commission, Poland and Hungary presented oral argument.

V. Arguments of the parties

A. The Commission

25. The Commission underlined at the hearing that although the provisions of the Law on the Supreme Court challenged in these proceedings were modified by the Law of 21 November 2018, it is not certain whether that law eliminates the alleged violations of EU law, and in any event, there remains an interest in deciding this case in view of the importance of judicial independence in the Union legal order.

⁴ Order of the Vice-President of the Court of 19 October 2018, *Commission v Poland*, C-619/18 R, not published, EU:C:2018:852.

⁵ Order of the Court of 17 December 2018, *Commission v Poland*, C-619/18 R, EU:C:2018:1021.

⁶ Order of the President of the Court of 15 November 2018, *Commission v Poland*, C-619/18, EU:C:2018:910.

26. The Commission further stressed at the hearing that, under the Court's case-law,⁷ the contested measures fall within the scope of the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter is relevant in so far as that article imports the requirements of independence and impartiality into the second subparagraph of Article 19(1) TEU. This means that Article 51(1) of the Charter does not apply, so that the Commission, by instituting these proceedings, is in no way extending Union competence, as precluded by Article 6(1) TEU.

27. By its first complaint, the Commission alleges that by lowering the retirement age of Supreme Court judges appointed to that court before 3 April 2018, Articles 37(1) and 111(1) and (1a) of the Law on the Supreme Court violate the principle of irremovability of judges which constitutes an essential aspect of judicial independence. Although it does not exclude regimes where the retirement age of a judge is not identical to that which was in force at the time that judge was appointed, to comply with Article 19(1) TEU, adequate safeguards, such as transitional measures or a phased approach, must be included so that such regimes are not used to change the composition of courts.

28. The Commission asserts that the contested measures affect over one third, or 27 out of 72, of the Supreme Court judges, including the First President of the Supreme Court whose six-year mandate, guaranteed under Article 183(3) of the Polish constitution, should have expired on 30 April 2020 and whose activities as judge should have ceased on 22 November 2022. In its view, in the absence of transitory measures, the contested measures bring about a profound and immediate change in the Supreme Court's composition. This violates the principle of irremovability of judges, since the lowered retirement age applies to the Supreme Court judges in office on the date of entry into force of the Law on the Supreme Court and has a serious impact on the independence of the Supreme Court which is composed of judges who generally have extensive professional experience and whose age is therefore more advanced.

29. The Commission further argues, *inter alia*, that the objective of aligning the retirement age of Supreme Court judges with the general retirement age cannot justify a violation of the principle of irremovability of judges. It takes the view that although some judges affected by the contested measures were appointed when the retirement age was set at 65 years, their mandate was extended until they reached the age of 70 in 2002, and this new age limit must be taken into account for assessing whether the duration of the judge's mandate has been shortened.

30. By its second complaint, the Commission alleges that Articles 37(1) to (4) and 111(1) and (1a) of the Law on the Supreme Court and the Amending Law of 10 May 2018 which grant the President of the Republic power to extend the active mandate of Supreme Court judges violates the principle of judicial independence because his decision is not based on any binding criteria, nor subject to judicial review, and thus entails an excessive margin of discretion allowing him to exert influence on Supreme Court judges. According to the Commission, since the President may decide to extend the active mandate of a Supreme Court judge two times for a period of 3 years each, the need for a judge to obtain authorisation to continue to exercise his functions after the expiration of the first period of 3 years also violates the principle of judicial independence. It stresses that this complaint includes judges appointed to the Supreme Court after 3 April 2018.

31. In particular, the Commission argues that the President's duty to request the opinion of the National Council of the Judiciary ('NCJ') does not eliminate his excessive discretion, since that opinion is linked to very general criteria and is not binding on the President. The Commission also considers that with the reform of the NCJ, composed of a majority of judges chosen by the Parliament, instead of their peers in violation of European norms,⁸ it cannot ensure judicial

⁷ Judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses ('ASJP')*, C-64/16, EU:C:2018:117, and of 25 July 2018, *Minister for Justice and Equality*, C-216/18 PPU, EU:C:2018:586.

⁸ The Commission refers, in particular, to Council of Europe Committee of Ministers, Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, 17 November 2010 ('2010 Recommendation'), point 27.

independence. It adds that for judges who reach 65 years by 3 July 2018, the contested measures do not specify the criteria that the NCJ should consider when issuing its opinion, and for judges who reach 65 years after 3 July 2018, there is no time limit within which the President must request such an opinion.

32. The Commission further asserts the regimes of other Member States are not comparable to the situation in Poland, and Polish rules on the secrecy of deliberations and composition of chambers disregard the fact that judicial independence concerns the organisation of the judiciary and whether the body has an appearance of independence.

B. The Republic of Poland

33. The Republic of Poland, first, submits that this case is devoid of purpose and should be withdrawn because all of the provisions challenged in these proceedings have been repealed, and their effects eliminated, by the Law of 21 November 2018.

34. Poland, supported by Hungary, further argues that the contested measures do not fall within the material scope of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter. It underlines in that regard that the complaints must be examined separately, as those provisions have different scopes of application.

35. In particular, Poland, joined by Hungary, submits that, pursuant to Article 19(1) TEU, it is not disputed that Poland ensures that litigants have an effective system of remedies and that Polish judges are covered by a system of guarantees of independence, and the evaluation of those guarantees cannot be examined solely on the basis of a particular provision relating to the retirement of judges irrespective of the whole legal system of which it is part. They also stress that the *ASJP*⁹ judgment is distinguishable, since it concerns national measures implementing EU law, and does not stand for the proposition that the Union has acquired a competence in the organisation of justice.

36. As regards Article 47 of the Charter, Poland and Hungary submit that the contested measures do not implement EU law within the meaning of Article 51(1) thereof, nor have subjective rights of individuals been violated. Poland stresses that Article 6(1) TEU and Article 51(2) of the Charter preclude an interpretation of the Charter allowing the EU to act beyond its conferred powers, as underscored by Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom¹⁰ which excludes extending the Court's powers.

37. As regards the first complaint, Poland argues that the Commission has not demonstrated the link between the change in the retirement age of the Supreme Court judges and alleged violation of the principle of irremovability of judges. In its view, there is nothing to suggest that the contested measures are a reaction to decisions of certain judges, and retirement of a judge cannot be regarded as dismissal, since the judge remains bound by his employment relationship and receives a salary. It refers to the guarantees of independence of judges enshrined in the Polish constitution, including the irremovability of judges, which implies that when a judge has reached the expected age, he retires.¹¹

⁹ Judgment of 27 February 2018, C-64/16, EU:C:2018:117.

¹⁰ OJ 2016 C 202, p. 312 ('Protocol No 30').

¹¹ Poland refers in particular to Article 180(1) and (4) of the Polish constitution.

38. Poland submits, *inter alia*, that it is not required under Article 19(1) TEU to provide a transitional period when lowering the retirement age of judges to guarantee their independence. It also claims that of the 27 out of 72 judges concerned by the contested measures, 17 judges were appointed to the Supreme Court when the retirement age was set at 65 years, and of the 10 judges appointed when the retirement age was 70 years, 3 judges were authorised by the President of the Republic to continue in their post, which means that only 7 judges were affected by a lower retirement age compared to the one in effect at the time of their appointment to the Supreme Court.

39. Poland, supported by Hungary, emphasised at the hearing that the objective of the contested measures is to align the retirement age of Supreme Court judges with the general retirement age in Poland, as recognised in the Court's case-law.¹² Moreover, Hungary considers that the contested measures are part of a general legislative package which is not aimed at a specific group of judges, and the Commission's line of argument limits national legislatures from adapting the relevant rules to cope with economic and societal changes.

40. As regards the second complaint, Poland submits that the Commission's allegation of a potential risk of pressure on a Supreme Court judge in connection with the President of the Republic's extension of his mandate cannot be regarded as a violation of the second subparagraph of Article 19(1) TEU. In particular, it contends that Supreme Court judges enjoy guarantees of independence to enable them to make their decisions free from pressure, and emphasises the rules in Poland on the secrecy of deliberations and composition of chambers. It claims that the President is acting as part of his constitutional prerogative to appoint judges as guardian of the Polish constitution,¹³ and thus he makes his own appreciation on the basis of the values flowing therefrom, without being bound by the opinions of the First President (or the College) of the Supreme Court and the NCJ. According to Poland, the absence of judicial review of his decision is explained by the fact that the employment relationship of Supreme Court judges falls under Polish public law, and such judicial review would also be inconsistent with Polish constitutional law.

41. Poland further asserts that the NCJ is bound by the criteria set out in the contested measures for issuing its opinion, including for judges who reach the age of 65 by 3 July 2018, and although for judges who reach the age of 65 after 3 July 2018, those measures do not indicate a time limit within which the President must request such an opinion, in practice he will do so immediately. It stressed at the hearing that the reform of the NCJ is marginal to the present case, and the Commission's line of argument that judicial independence requires that decisions of this type be taken by judges, through the bodies they elect, rests on standards which are not generally accepted in the EU and goes against the regimes of several Member States and the Court of Justice of the EU, thereby leading to double standards of judicial independence.

VI. Analysis

42. I have come to the conclusion that a separate assessment of the material scope of Article 19(1) TEU and Article 47 of the Charter is required. In consequence, the complaints should be rejected as inadmissible in so far as they are based on Article 47 of the Charter, given that the Commission has furnished no arguments to illustrate that implementation of EU law by Poland has occurred, as required by Article 51(1) of the Charter. I also conclude that the complaints are well founded in so far as they are based on the second subparagraph of Article 19(1) TEU, and that this action is not barred by the initiation of the Article 7(1) TEU mechanism.

¹² Judgments of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, and of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687.

¹³ Poland refers, in particular, to Articles 126, 144(3), point 17, and 179 of the Polish constitution.

43. My analysis is structured in four main parts concerning: first, the admissibility of the action in connection with the Law of 21 November 2018 (A); second, the relationship between Article 258 TFEU and Article 7 TEU (B); third, the material scope of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter and the Commission's reliance on these combined provisions (C); and fourth, the merits of the action (D).

A. Admissibility of the action in connection with the Law of 21 November 2018

44. The Court has consistently held that the question of whether a Member State has failed to fulfil its obligations under Article 258 TFEU is determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion.¹⁴ An action in respect of an infringement which no longer existed at the time that period expired is inadmissible because it is devoid of purpose.¹⁵

45. It is also settled case-law that the Commission still has an interest in bringing an action under Article 258 TFEU even when the alleged infringement is remedied after the expiry of the period prescribed in the reasoned opinion.¹⁶ That action retains its object which may consist, in particular, in establishing the basis of the liability that Member State could incur towards those who acquire rights as a result of its default.¹⁷

46. In the present case, the Commission called on Poland to comply with the reasoned opinion within 1 month of receipt (see point 12 of this Opinion) which was 14 August 2018, as indicated by the receipt stamp. Thus, the question whether obligations have not been fulfilled must be determined by reference to the situation prevailing in Poland as of 14 September 2018. As the Law of 21 November 2018 entered into force on 1 January 2019, that is, after the period laid down in the reasoned opinion expired, that law cannot be taken into account and does not render this action devoid of purpose.

47. Consequently, the Law of 21 November 2018 does not remove the need for the Court to rule in this case, and indeed, there is a compelling interest for the Union, other Member States and individuals in the Court's judgment. In substantive terms, that judgment will build on respect for the rule of law in the EU legal system, and provide guidance on what is required in order for it to be protected. The question whether the Law of 21 November 2018 sufficiently remedies the alleged infringements of EU law therefore has no bearing on these proceedings.¹⁸

B. Article 258 TFEU and Article 7 TEU

48. According to Article 258 TFEU, the Commission may bring an infringement action where it considers that a Member State has failed to fulfil 'an obligation under the Treaties'. The reference to 'the Treaties' in that provision, as compared to former Article 226 EC which referred to 'this Treaty', signifies that the Commission may bring such an action for alleged failures to fulfil obligations under the TEU and the TFEU,¹⁹ subject to the specific carve-out in the field of the Common Foreign and

14 See judgment of 22 February 2018, *Commission v Poland*, C-336/16, EU:C:2018:94, paragraph 47.

15 See judgment of 4 May 2006, *Commission v United Kingdom*, C-508/03, EU:C:2006:287, paragraph 73.

16 See judgment of 14 April 2005, *Commission v Luxembourg*, C-519/03, EU:C:2005:234, paragraph 19.

17 See judgment of 10 April 2008, *Commission v Italy*, C-442/06, EU:C:2008:216, paragraph 42.

18 See judgment of 18 July 2007, *Commission v Germany*, C-503/04, EU:C:2017:432, paragraphs 15 and 16.

19 See the third paragraph of Article 1 TEU; Article 1(2) TFEU.

Security Policy as provided in the second subparagraph of Article 24(1) TEU and Article 275 TFEU.²⁰ Such an action also covers alleged infringements of the Charter which constitutes binding primary Union law,²¹ provided that the Member State's conduct falls within its scope of application.²²

49. That said, can the Commission bring an infringement action under Article 258 TFEU when the Article 7(1) TEU mechanism has already been triggered as is the case here? Indeed, it is debated in the doctrine whether Article 7 TEU operates as a '*lex specialis* for monitoring and sanctioning (non-) observance of EU values, thereby having priority over, or indeed excluding, the application of the procedure of Article 258 TFEU'.²³ In these proceedings, although the Commission bases this action on the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the same legislative changes, relating to the Law on the Supreme Court as amended, are also relied on in its Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by Poland of the rule of law, triggering for the first time the Article 7(1) TEU mechanism.²⁴

50. There are firm grounds for finding that Article 7 TEU and Article 258 TFEU are separate procedures and may be invoked at the same time. In particular, the wording of each provision does not rule out the other and as mentioned above (see point 48 of this Opinion), the reference to 'an obligation under the Treaties' in Article 258 TFEU covers in principle all rules of non-CFSP Union law. This is supported by the different scheme and purpose of the procedures established in Article 7 TEU and Article 258 TFEU. Article 7 TEU is essentially a 'political' procedure to combat a Member State's 'serious and persistent breach' of the values set out in Article 2 TEU, subject to high thresholds, and may lead to the suspension of the Member State's membership rights including its participation rights.²⁵ Article 258 TFEU constitutes a direct 'legal' route before the Court for ensuring the enforcement of EU law by the Member States, and is aimed at obtaining a declaration of infringement and may also lead to the imposition of financial penalties in the procedure set out in Article 260 TFEU, with a view to encouraging the Member State concerned to terminate the infringing conduct.²⁶ These differences reflect the autonomous, indeed complementary, nature of these procedures and that they may apply in parallel.²⁷ Moreover, the fact that Article 269 TFEU, concerning challenge to the legality of an act adopted by the European Council or the Council pursuant to Article 7 TEU, restricts the Court's jurisdiction to the 'procedural stipulations' in Article 7 TEU cannot diminish the Court's authority to rule on the basis of its jurisdiction under Article 258 TFEU.²⁸

51. Consequently, the fact that the Article 7(1) TEU mechanism has been engaged does not preclude the present action.

20 See Craig, P., and De Búrca, G., *EU Law: Text, Cases and Materials*, 6th ed., OUP, 2015, p. 431.

21 See, in particular, the first subparagraph of Article 6(1) TEU.

22 See Opinion of Advocate General Saugmandsgaard Øe in *Commission v Hungary*, C-235/17, EU:C:2018:971, points 64 to 127 and in particular points 66 and 67; Łazowski, A., 'Decoding a Legal Enigma: the Charter of Fundamental Rights of the European Union and infringement proceedings', ERA Forum, Vol. 14, 2013, pp. 573 and 577. See further points 52 to 60 and 65 to 67 of this Opinion.

23 Editorial Comments, 'Safeguarding EU values in the Member States – Is something finally happening?', Common Market Law Review, Vol. 52, 2015, pp. 619 and 626-627.

24 Reasoned Proposal, note 3, in particular points 4.1.1 and 4.1.2 and recitals 172 and 175.

25 See Closa, C. and Kochenov, D. (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, CUP, 2016; Jakab, A. and Kochenov, D. (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, OUP, 2017; 'Liability of Member States for the Violation of Fundamental Values of the European Union', *Europarecht Beiheft* 1, 2018.

26 See Lenaerts, K., Maselis, I. and Gutman, K., *EU Procedural Law*, Nowak, J.T., (Ed.), OUP, 2015, pp. 159-161; Prete, L., *Infringement Proceedings in EU Law*, Kluwer, 2017, pp. 29-34.

27 See Hillion, C., 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in Closa and Kochenov, note 25, pp. 59 and 71-74; Hoffmeister, F., 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?', in Armin von Bogdandy and Pál Sonnevend (Eds.), *Constitutional Crisis in the European Constitutional Area*, Hart, 2016, pp. 195 and 205-206.

28 See Schmidt, M. and Bogdanowicz, P., 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU', Common Market Law Review 1061, Vol. 55, 2018, pp. 1069-1073, in particular 1071.

C. Scope of application of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter

1. Separate assessment

52. The Commission has brought this action on the grounds that Poland failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter. It appears that its action is based on both of those provisions.

53. This raises the question whether a separate assessment of the material scope of the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter must be undertaken, as argued by Poland, or whether, as the Commission contends, it is not necessary, for the purposes of alleging violation of the second subparagraph of Article 19(1) TEU, to demonstrate that the contested measures implement EU law within the meaning of Article 51(1) of the Charter, so that the independence requirements of Article 47 of the Charter may be ‘imported’ into the second subparagraph of Article 19(1) TEU.

54. I agree with Poland that a separate assessment of the material scope of the second subparagraph of Article 19(1) TEU, and of Article 47 of the Charter is required. This is borne out by the Court’s case-law which refers to the relationship between those two provisions in ensuring effective judicial protection, while indicating that the scope of Article 47 of the Charter, as far as Member State action is concerned, is defined in Article 51(1) thereof.²⁹

55. The *ASJP* case further supports this analysis. Although the request for a preliminary ruling in that case concerned the interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the Court’s judgment rested on the former provision.³⁰ In particular, the Court ruled that ‘as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to “the fields covered by Union law”, irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter’.³¹ The Court acknowledged the relationship between Article 19(1) TEU and Article 47 of the Charter, and in turn Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’) on which the first and second paragraphs of that latter article is based,³² in giving expression to the principle of effective judicial protection, and that the requirements of judicial independence under the second subparagraph of Article 19(1) TEU correspond to those under the second paragraph of Article 47 of the Charter which refers to access to an ‘independent’ tribunal as one of the requirements linked to a fundamental right to an effective remedy. However, the Court mentioned Article 47 of the Charter and related case-law only to confirm findings made on the basis of Article 19(1) TEU.³³

56. Thus, a combined application of those two provisions in the absence of assessment under Article 51(1) of the Charter cannot be deduced from *ASJP*. Rather, it may be inferred from that judgment that the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter have different material scopes.

²⁹ See judgments of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraphs 54 and 55, and of 13 March 2018, *European Union Copper Task Force v Commission*, C-384/16 P, EU:C:2018:176, paragraphs 116 and 117, and *Industrias Químicas del Vallés v Commission*, C-244/16 P, EU:C:2018:177, paragraphs 106 and 107.

³⁰ Judgment of 27 February 2018, C-64/16, EU:C:2018:117, paragraphs 1, 18, 27 and operative part.

³¹ Judgment of 27 February 2018, *ASJP*, C-64/16, EU:C:2018:117, paragraph 29.

³² See Explanations Relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), Explanation on Article 47, pp. 29 and 30.

³³ Judgment of 27 February 2018, *ASJP*, C-64/16, EU:C:2018:117, paragraphs 35, 41 and 42.

57. A contrary finding would be apt to undermine the current system of review of the compatibility of national measures with the Charter and open the door for Treaty provisions such as Article 19(1) TEU to be used as a ‘subterfuge’ to circumvent the limits of the scope of application of the Charter as set out in Article 51(1) thereof.

58. The Court’s judgment in *ASJP* should not be considered as diminishing the Charter or Article 47 thereof. It appears to be an elegant and coherent solution which respects the limits of the Charter vis-à-vis the Member States, while advancing the EU system of judicial protection and protecting the core values of the EU as established in Article 2 TEU.³⁴ By virtue of that judgment, Article 19(1) TEU constitutes an autonomous standard for ensuring that national measures meet the requirements of effective judicial protection, including judicial independence, which complements Article 47 of the Charter (and other provisions of the Charter as the case may be).³⁵

59. As underscored by subsequent judgments, such as *Achmea*³⁶ and *Minister for Justice and Equality*,³⁷ the national courts and the Court have shared responsibility, under Article 19(1) TEU, to ensure the full application of EU law in all Member States and judicial protection of individuals’ rights under that law. Following from this, national measures which prevent national courts from carrying out their tasks as EU courts, such as those which deprive them of their jurisdiction over disputes involving the interpretation and application of EU law (*Achmea*) or impair their independence (*Minister of Justice and Equality*), hinder the Court from carrying out its mandate, under Article 19(1) TEU, to ensure that in the application and interpretation of the Treaties the law is observed.³⁸ In effect, such measures jeopardise the structure and functioning of the Union legal order. By developing the obligations of the Member States under Article 19(1) TEU in *ASJP*, the Court is within its competences conferred on it under the Treaties to ensure the foundations of the Union legal order remain intact.

60. It is for the foregoing reasons that where, as here, the Commission relies on the combined provisions of the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter, it is required to demonstrate that the contested measures fall within the material scope of those provisions independently.

2. Application of the second subparagraph of Article 19(1) TEU to these proceedings

61. In *ASJP*,³⁹ the Court held that Article 19 TEU gives concrete expression to the value of the rule of law in Article 2 TEU, and that the second subparagraph of Article 19(1) TEU obliges every Member State to ensure that the bodies which, as ‘courts and tribunals’ defined by EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection including judicial independence. To the extent that such a court may rule on questions concerning the application or interpretation of EU law, the Member State concerned must ensure that that court meets those requirements.

34 Indeed, it is argued in the literature that a Member State’s breach of the values set out in Article 2 TEU can be prosecuted by the Commission under Article 258 TFEU. See Scheppele, K.L., ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Closa and Kochenov, note 25, p. 105; Waelbroeck, M. and Oliver, P., ‘La crise de l’état de droit dans l’Union européenne : que faire ?’, Cahiers de droit européen, 2017, p. 299.

35 See Bonelli, M. and Claes, M., ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary’, European Constitutional Law Review, Vol. 14, 2018, p. 622; Krajewski, M., *Associação Sindical Dos Juizes Portugueses*: The Court of Justice and Athena’s Dilemma, European Papers, Vol. 3, 2018, p. 395; Pech, L. and Platon, S., ‘Judicial independence under threat: The Court of Justice to the rescue in the *ASJP* case’, Common Market Law Review, Vol. 55, 2018, p. 1827.

36 Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, in particular paragraphs 36, 55 and 56.

37 Judgment of 25 July 2018, *Minister for Justice and Equality*, C-216/18 PPU, EU:C:2018:586, in particular paragraphs 48 to 55.

38 See Barents, R., *Remedies and Procedures before the EU Courts*, Breese, H.E. (Ed.), Kluwer, 2016, pp. 112-113. See also Opinion of Advocate General Saugmandsgaard Øe in *ASJP*, C-64/16, EU:C:2017:395, point 41.

39 Judgment of 27 February 2018, C-64/16, EU:C:2018:117, paragraphs 32, 37 to 41.

62. The fact that the measures at issue in *ASJP* were linked to an EU financial assistance programme did not figure in the Court's analysis of the material scope of the second subparagraph of Article 19(1) TEU, and thus provides no basis on which to distinguish that case from the present one.

63. In the present case, it is not disputed that the Polish Supreme Court may rule, as a court or tribunal defined by EU law, on questions concerning the application and interpretation of EU law.⁴⁰ Accordingly, the contested measures which are alleged to impair that court's independence fall within the material scope of the second subparagraph of Article 19(1) TEU.⁴¹ Thus, it is because this action concerns an alleged breach of the rule of law, a foundational value of the Union and reflected in Article 19 TEU, that the Commission can institute these proceedings under Article 258 TFEU against a Member State, even when that Member State is not implementing EU law under Article 51(1) of the Charter.

64. Finally, the interpretation which I am suggesting here of Article 19(1) TEU is consistent with the Court's case-law concerning the scope of Protocol No 30.⁴² The expansion of the Commission's powers to bring proceedings against Member States under Article 258 TFEU with respect to breach of the TEU occurred, like the addition of Protocol No 30, during the Lisbon revision of the Treaties. Therefore, allowing the Commission to bring direct actions against Member States for breach of TEU provisions, like Article 19(1) TEU, in no way expands EU competence in a manner going beyond what was agreed by the Lisbon revision process.⁴³

3. Inapplicability of Article 47 of the Charter to these proceedings

65. As noted above, the Commission has put forward no arguments in its application on the scope of application of Article 47 of the Charter and how the contested measures implement EU law within the meaning of Article 51(1) of the Charter,⁴⁴ and argued that Article 51(1) is not relevant to these proceedings.

66. Under settled case-law, in an action based on Article 258 TFEU, the Commission must prove the alleged failure to fulfil obligations by placing before the Court all of the information needed to establish that the obligation has not been fulfilled.⁴⁵ In particular, the Commission must indicate in its application under Article 258 TFEU, the specific complaints on which the Court is asked to rule and at the very least, in summary form, the legal and factual particulars on which those complaints are based. As regards those legal particulars, it is not sufficient for the Commission, in order to claim that the defendant Member State has not complied with a provision of EU law, merely to cite that provision in the section of the reasoned opinion or application which covers the legal context and which is purely descriptive and lacking of any explanatory character.⁴⁶

⁴⁰ See, for example, judgment of 20 December 2017, *Polkomtel*, C-277/16, EU:C:2017:989.

⁴¹ It may be considered that the material scope of the second subparagraph of Article 19(1) TEU does not cover the review of every national measure, however marginal, which relates to the organisation of the judiciary, but rather, is concerned predominantly with objective independence and national measures having a generalised impact on the overall system established by the Member States for ensuring effective judicial protection and the essential requirements thereof.

⁴² Judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 119 and 120. See also Opinions of Advocate General Trstenjak in *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:611, points 167 to 171, and of Advocate General Kokott in *Bonda*, C-489/10, EU:C:2011:845 points 21 to 23.

⁴³ See Łazowski, note 22, pp. 580-581; Prete, note 26, pp. 74-75.

⁴⁴ See judgments of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 49, and of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 55.

⁴⁵ See judgment of 13 November 2008, *Commission v Poland*, C-227/07, EU:C:2008:620, paragraph 67.

⁴⁶ See judgment of 29 November 2001, *Commission v Italy*, C-202/99, EU:C:2001:646, paragraph 21.

67. The Commission has failed to put forward legal particulars concerning the application of Article 47 of the Charter to the contested measures independently of the second subparagraph of Article 19(1) TEU and how they implement EU law within the meaning of Article 51(1) of the Charter. Its complaints should therefore be rejected as inadmissible as far as they are based on Article 47 of the Charter.

D. Merits of the action

1. The first complaint

68. By its first complaint, the Commission alleges that by lowering the retirement age of Supreme Court judges appointed to that court before 3 April 2018 when the Law on the Supreme Court entered into force, Articles 37(1) and 111(1) and (1a) of that law violate the principle of irremovability of judges. The Commission bases this claim on the pre-term removal of over one third of the Supreme Court judges in office and on the lack of transitory measures.

69. Poland argues that the Commission has not demonstrated that the contested measures violate that principle, taking account of the limited number of judges affected and their objective of aligning the retirement age of the Supreme Court judges with the general retirement age. It also refers to guarantees of independence inherent in its constitution.

70. The Court has held, with regard to the second subparagraph of Article 19(1) TEU, that protection against removal from office of the members of the body concerned is one of the guarantees essential to judicial independence.⁴⁷ Indeed, protection against removal from office (irremovability) ‘is the basis and the reflection of judicial independence and means that judges cannot be dismissed, suspended, moved or retired except on grounds, and subject to the safeguards, provided by law’.⁴⁸

71. Recently, the European Court of Human Rights reiterated the circumstances in which removal of a judge from office violates the independence and impartiality of a judge under Article 6(1) of the ECHR. The objective element of impartiality protected by that article requires objective assessment of whether the tribunal itself, and among other aspects its composition, offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. Appearances are of a certain importance, so that ‘justice must not only be done, it must also be seen to be done’. What is at stake is the confidence which courts in a democratic society must inspire in the public.⁴⁹ Those principles form a source of inspiration for principles of EU law which are applicable, at minimum, when the Commission, in Article 258 TFEU proceedings, alleges a breach of the rule of law as protected by Article 2 TEU and which is specifically expressed in Article 19 TEU.⁵⁰

⁴⁷ Judgments of 27 February 2018, *ASJP*, C-64/16, EU:C:2018:117, paragraph 45, and of 7 February 2019, *Escribano Vindel*, C-49/18, EU:C:2019:106, paragraph 66.

⁴⁸ Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster*, C-17/00, EU:C:2001:366, point 93.

⁴⁹ ECtHR, 25 September 2018, *Denisov v. Ukraine*, ECHR:2018:0925JUD007663911, paragraphs 61 and 63.

⁵⁰ Similarly, the case-law of the Court on the meaning of ‘independence’ is relevant to the interpretation of Article 19(1) TEU. See, for example, judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraphs 49 to 53.

72. The irremovability of judges, along with security of tenure, are also recognised as fundamental guarantees of judicial independence in guidelines⁵¹ issued by European and international bodies relating to judicial independence.⁵² In particular, judges should have a guaranteed tenure until a mandatory retirement age or the expiry of their term of office, and can be subject to suspension or removal from office in individual cases only for reasons of incapacity or behaviour rendering them unfit for office. Early retirement should be possible only at the request of the judge concerned or on medical grounds, and any changes to the obligatory retirement age must not have retroactive effect.

73. In the present case, the Commission has sufficiently demonstrated that the contested measures violate the principle of irremovability of judges, whose observance is necessary to meet the requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU.⁵³

74. The circumstances of the present case are distinguishable from those which gave rise to the Court's judgment in *ASJP*.⁵⁴ In that judgment, the Court ruled that the salary-reduction measures in question did not impair the judicial independence of the national court concerned based on the following circumstances: first, those measures were adopted because of the overriding need to remove the excessive budget deficit of the Member State in the context of an EU programme of financial assistance, and provided for a limited reduction of the amount of remuneration; second, they applied widely to various employees in the public sector, including representatives of the legislature, the executive and the judiciary, and thus could not be perceived as being specifically adopted in respect of the members of that court; and third, they were temporary in nature, as they were abolished over a period of 2 years.

75. A close reading of that judgment indicates that the Court took account of several relevant circumstances in its assessment and, in particular, the limited impact and general scope of the measures as not specifically targeted at the judiciary. It does not follow from *ASJP* that provisions applicable to judges related to general policies at the national level are not contrary to the principle of judicial independence, but rather that the Court's assessment depends on the circumstances of the case.

76. In this case, the Commission has shown that the contested measures, first, have a considerable impact on the composition of the Supreme Court because they affect 27 out of 72 judges; second, constitute specific legislation adopted in respect of members of the Supreme Court; and third, are not envisaged to be temporary. In addition to this, a sudden and unforeseen removal of a large number of judges inevitably creates difficulties in terms of public confidence. It is principally for this reason that a transitional arrangement, securing continuity of the court, is needed.

⁵¹ I note that such guidelines are so-called 'soft law' or non-binding norms, yet they embody a 'normative consensus' of rules and principles shared by the Member States (and other jurisdictions) which provide a useful reference for the Court. See Hoffmann-Riem, W., 'The Venice Commission of the Council of Europe – Standards and Impact', *European Journal of International Law*, Vol. 25, 2014, pp. 579-597.

⁵² See, for example, Council of Europe, European Charter on the statute of judges, 8-10 July 1998, DAJ/DOC (98) 23, point 3.4; 2010 Recommendation, note 8, points 49 to 52; Council of Europe Consultative Council of European Judges (CCJE), *Magna Carta of Judges* (Fundamental Principles), 17 November 2010, CCJE (2010)3 Final, point 4; International Bar Association, *Minimum Standards of Judicial Independence*, 1982, point 20; United Nations, *Basic Principles on the Independence of the Judiciary*, 1985, points 12 and 18; International Association of Judges, *Universal Charter of the Judge*, revised 2017, Article 2-2.

⁵³ As indicated by the Commission, the Council of Europe European Commission for Democracy Through Law (Venice Commission) considered that early retirement of the currently sitting judges undermines both their security of tenure and the independence of the Polish Supreme Court in general in its Opinion No 904/2017 of 11 December 2017 on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, CDL-AD(2017)031, point 48. See also, for example, United Nations Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, 5 April 2018, A/HRC/38/38/Add.1, point 55; Organisation for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), 13 November 2017, JUD-POL/315/2017, point 112.

⁵⁴ Judgments of 27 February 2018, C-64/16, EU:C:2018:117, paragraphs 46 to 51, and of 7 February 2019, *Escribano Vindel*, C-49/18, EU:C:2019:106, paragraph 67.

77. I am not persuaded by Poland's argument that, as regards judges appointed under a previous regime providing for the lower retirement age of 65, the principle of irremovability of judges is not impaired. As the Commission indicates, this disregards the fact that their term was extended to the retirement age of 70 by the 2002 Law on the Supreme Court and then terminated prematurely by the contested measures.

78. Moreover, although the contested measures were applicable for a period of about nine months, from 3 April 2018 to 1 January 2019 at which point the Law of 21 November 2018 entered into force, there is no indication at the time that they were passed that those measures were intended to be temporary. The adoption of the Law of 21 November 2018 apparently stemmed from the Court's order for interim measures (see points 16 to 21 of this Opinion).⁵⁵

79. Even if, as argued by Poland, it is considered that the objective of the contested measures is to align the retirement age of Supreme Court judges with the general retirement age, it is not disputed that those measures were applied retroactively to all judges in office without any safeguards in place by way of appropriate measures to guarantee the irremovability of judges. As illustrated by the Court's case-law, while the Member States have competence to adjust the retirement ages of judges in view of societal and economic changes, they must do so without compromising the independence and irremovability of judges in violation of their obligations under EU law.

80. In particular, *Commission v Hungary*⁵⁶ concerned infringement proceedings for Hungary's failure to fulfil obligations under Articles 2 and 6(1) of Directive 2000/78 by adopting measures which lowered the retirement age of judges, prosecutors and notaries from 70 to 62 years of age. The Court held that the measures concerned gave rise to a difference in treatment based directly on age, and then assessed whether they could be justified by a legitimate aim and were proportionate pursuant to Article 6(1) of that directive. On that basis, the Court, drawing from its previous case-law including *Fuchs and Köhler*,⁵⁷ held that the objectives put forward by Hungary which included standardising the age limit for compulsory retirement in the public sector were legitimate, but found the measures disproportionate.

81. By comparison, *Commission v Hungary*⁵⁸ involved a failure to fulfil obligations under Directive 95/46/EC⁵⁹ on the grounds that Hungary prematurely terminated the term served by the data protection supervisor and thereby compromised his independence in breach of Article 28(1) of that directive. In its judgment, the Court reiterated that if it were permissible for a Member State to compel a supervisory authority to vacate office before serving the full term, the threat of such premature termination could lead it to enter into a form of 'prior compliance' with the political authority incompatible with the requirement of independence. The Court rejected Hungary's argument that institutional changes to the system of data protection were an objective reason justifying the premature termination, underlining that such changes must be *organised* to meet the requirement of independence laid down in EU law, and although Member States are free to adopt or amend the institutional model, they must ensure that the independence of the authority is not compromised.

⁵⁵ See European Parliament Study, *The EU framework for enforcing the respect of the rule of law and the Union's fundamental principles and values*, Directorate General for Internal Policies of the Union, Policy Department for Citizens' Rights and Constitutional Affairs, 2019, PE 608.856, p. 25.

⁵⁶ Judgment of 6 November 2012, C-286/12, EU:C:2012:687, paragraphs 54-81.

⁵⁷ Judgment of 21 July 2011, C-159/10 and C-160/10, EU:C:2011:508, in particular paragraph 50.

⁵⁸ Judgment of 8 April 2014, C-288/12, EU:C:2014:237, paragraphs 54, 59 and 60. My emphasis.

⁵⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), now repealed by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).

82. As illustrated by the foregoing case of *Commission v Hungary*,⁶⁰ involving the retirement age of judges, along with *Fuchs and Köhler*, the Court has deemed legitimate certain objectives relating to the alignment of retirement age within the specific framework set out in Directive 2000/78 in respect of the prohibition on discrimination on the basis of age. However, in *Commission v Hungary*,⁶¹ involving the pre-term removal of the data protection supervisor, the Court did not allow such objectives to diminish the independence of national supervisory authorities under EU law. That reasoning is just as compelling in the case of the independence of judges. It may also be inferred from the Court's consideration of judicial independence as 'essential' to effective judicial protection under the second subparagraph of Article 19(1) TEU.⁶²

83. In light of the foregoing reasons, the first complaint raised by the Commission should be considered to be well founded.

2. The second complaint

84. By its second complaint, the Commission alleges that Articles 37(1) to (4) and 111(1) and (1a) of the Law on the Supreme Court and the Amending Law of 10 May 2018 violate the principle of judicial independence because the President of the Republic's discretion to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age allows him to exert influence on the Supreme Court and its judges. The Commission bases its claim primarily on the grounds that the President of the Republic's decision is not subject to binding criteria or judicial review, and his duty to request an opinion of the NCJ does not eliminate his excessive discretion since that opinion is linked to general criteria and is not binding on him.

85. Poland contends that no violation of judicial independence is made out, taking into account, in particular, the role of the President of the Republic as guardian of the Polish constitution and the system of guarantees of judicial independence in Polish law.

86. According to the requirements of judicial independence which the Member States must meet under the second subparagraph of Article 19(1) TEU, the concept of independence presupposes, in particular, that the body concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.⁶³

87. Those requirements represent the external aspect of the principle of judicial independence, which the Court has underlined, require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order 'to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'.⁶⁴

88. I also refer to the principles elaborated above by the European Court of Human Rights that the objective element of the principle of judicial independence requires sufficient guarantees to exclude any legitimate doubt as to the body's independence and impartiality and ensure the appearance of independence (see point 71 of this Opinion).

⁶⁰ Judgment of 6 November 2012, C-286/12, EU:C:2012:687.

⁶¹ Judgment of 8 April 2014, C-288/12, EU:C:2014:237.

⁶² Judgment of 27 February 2018, *ASJP*, C-64/16, EU:C:2018:117, paragraphs 40 and 41.

⁶³ Judgments of 27 February 2018, *ASJP*, C-64/16, EU:C:2018:117, paragraph 44, and of 7 February 2019, *Escribano Vindel*, C-49/18, EU:C:2019:106, paragraph 66.

⁶⁴ See judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 53.

89. In the present case, the Commission has sufficiently demonstrated that the contested measures violate the requirements of judicial independence, since they are liable to expose the Supreme Court and its judges to external intervention and pressure from the President of the Republic in the initial extension and renewal of their mandate which impairs the objective independence of that court and influences the judges' independent judgment and decisions. This is so, especially given that the requirement to apply to the President of the Republic for the extension of retirement age is accompanied by a reduction in the retirement age.⁶⁵

90. Poland has acknowledged that the absence of authorisation by the President of the Republic to extend the term of office of a Supreme Court judge beyond the retirement age is not subject to judicial review.

91. Irrespective of Poland's arguments as to the prerogatives of the President under the Polish constitution, the system of guarantees of judicial independence enshrined in Polish law and the criteria taken into account by the NCJ in formulating its opinion as laid down in Article 37(1b) of the Law on the Supreme Court, those arguments are not sufficient to dispel the impression of the lack of objective independence of the Supreme Court resulting from the contested measures and, in particular, from the lack of binding criteria provided in those measures as indicated by the Commission.

92. With regard to the role of the NCJ, it is undisputed that its opinion is not binding. Irrespective of the composition of the NCJ, its role in no way dispels the impression of the inordinate breadth of power of the President of the Republic.

93. Moreover, Poland's arguments based on the laws of the other Member States and the Court of Justice of the EU fail to convince. As indicated by the Commission, the regimes of other Member States are not comparable to the situation in Poland, as they operate in a different legal, political and social context, and in any event, this has no bearing on Poland's failure to fulfil obligations. The reference to the Court of Justice of the EU is also irrelevant, there being no question of alteration to rules on the retirement age of judges of this Court and, moreover, is inapposite, as it is situated at the supranational level entailing a different regime than the classic tripartite separation of powers in the Member States.⁶⁶

94. In light of the foregoing reasons, the second complaint raised by the Commission should be considered well founded.

95. It follows from all of the foregoing that the Court should declare that, by lowering the retirement age of Supreme Court judges appointed to that court before 3 April 2018 and granting the President of the Republic discretion to extend the active mandate of Supreme Court judges, the Republic of Poland has violated the principles of irremovability and independence of judges and thereby failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

VII. Costs

96. Pursuant to Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

⁶⁵ The contested measures have also been considered contrary to European and international standards of judicial independence. See, for example, Council of Europe Bureau of the Consultative Council of European Judges (CCJE), Report on judicial independence and impartiality in the Council of Europe Member States in 2017, 7 February 2018, CCJE-BU(2017)11, point 158; United Nations Human Rights Council, Report of the Special Rapporteur, note 54, point 56.

⁶⁶ See Kosař, D., 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe', German Law Journal, Vol. 19, 2018, pp. 1567 and 1596.

97. According to my proposed solution, although the Commission's complaints should be rejected as inadmissible as far as they are based on Article 47 of the Charter, the Commission is successful on both complaints as far as they are based on the second paragraph of Article 19(1) TEU. Since the Commission has applied for costs and the Republic of Poland has been unsuccessful, the Republic of Poland should be ordered to bear its own costs and to pay those of the Commission.

98. In accordance with Article 140(1) of the Rules of Procedure, under which Member States which intervened in the proceedings are to bear their own costs, Hungary should be ordered to bear its own costs.

VIII. Conclusion

99. In the light of the foregoing considerations, I propose that the Court should:

- (1) declare that by lowering the retirement age of the judges of the Supreme Court and applying it to judges appointed to that court before 3 April 2018, and by granting the President of the Republic the discretion to extend the period of judicial activity of Supreme Court judges, the Republic of Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;
- (2) dismiss the action as to the remainder;
- (3) order the Republic of Poland to bear its own costs and to pay the costs of the Commission;
- (4) order Hungary to bear its own costs.